REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES
(3) REVISED.

CASE NO: A888/14

29/5/2018

In the matter between:

DANIEL CHAKA MOABI **Appellant**

and

State **Respondent**

JUDGMENT

MUNZHELELE AJ:

Introduction

[1] This is an appeal by the appellant, Daniel Chaka Moabi, in terms of section 309 of the Criminal Procedure Act 51 of 1977 (the Act), against the sentence of life imprisonment imposed on 16 May 2014 by Regional Magistrate Mr Nzimande in the Regional Division of North West held at Klerksdorp following

a conviction on one count of house breaking with intent to rape and rape read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997. The appellant was also declared unfit to possess a fire arm in terms of section 103 of Firearms Control Act 60 of 2000.

[2] Appellant was legally represented throughout the proceedings.

Background

[3] Upon his conviction and sentence, the appellant successfully applied to the trial court for leave to appeal. Following thereafter he brought an appeal to the Gauteng High Court, Pretoria, against the conviction and sentence which was heard before Judge Lauw and Acting Judge Koovertjie on 15 June 2015. The Pretoria High Court confirmed the court a *quo's* finding namely, that the act of rape had occurred and that the complainant had sustained injuries during the course of the rape. Accordingly, the appeal against the conviction was dismissed. However, the Pretoria High Court upheld the appeal on sentence on the basis that the infliction of grievous bodily harm requires intent; holding that the trial court erred when it found that intent was not a requirement as such. The Pretoria High Court further found that section 51(1) Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 was not applicable, but that section 51(2) (b) of Part Ill of Schedule 2 of Act 105 of 1997 was the applicable provision. The Pretoria High then set aside the trial court sentence of life imprisonment and substituted it with a sentence of 14 years imprisonment.

[4] The Director of Public Prosecutions, hereinafter "the OPP", lodged a successful application with the Supreme Court of Appeal, hereinafter "the SCA" for leave to appeal against the Pretoria High Court's substituted sentence. The ground of appeal was that the latter erred in finding that intent was a requirement *in casu.* On 2 June 2017 the SCA upheld the DPP's appeal. It found that intent to do grievous bodily harm was not an element in a rape contemplated in Part I (c) of the Criminal Law Amendment Act 105 of 1997. The sentence imposed by the Pretoria High Court was then set aside and the matter was remitted to the Pretoria High Court for a *de novo* hearing *vis-a-vis* sentence.

Facts

[5] On 3 April 2012 the complainant was asleep on a sofa inside her house when the appellant entered into the house. The appellant closed the complainant's mouth with his hand and pressed a sharp object against the side of her mouth. She sustained the following injuries: swollen upper and lower lip because of the blunt trauma. A wound on the chin of 0, 5 cm wide caused by the sharp object and it was sutured. She also suffered multiple soft tissue injuries. Her T-Shirt was blood-stained. The complainant wrestled with the appellant and broke the window to alert her neighbours about what was going on in her house. During the scuffle she managed to switch on the light and was then able to recognise was the appellant. This was the same person who was in the company of his boyfriend earlier in her house that day

[6] The complainant was then overpowered and strangled until she lost consciousness. When she regained consciousness, the respondent dragged her to the bedroom and ordered her to undress. He then pushed her onto the bed undressed her, undressed himself and raped her. She was heavily pregnant at the time and she pleaded with the appellant not to hurt her unborn twins. He nevertheless continued raping her. The appellant hit her with a fist on the buttocks. As a result of the rape the complainant suffered the following injuries: swelling on the labia minora, scarring on the posterior fourchette, tearing on the fossa navicularis, swelling on the hymen, fresh tears at 6 o’clock position and bruising on the hymen.

[7] After the respondent went away, the complaint went to the neighbour M P who arranged for a motor car to take her to the police station and later to the hospital where she was examined by Dr Mapeka who completed a medical report. She informed her boyfriend about the rape incident.

[8] Mildred Pamba was called to testify as a first report witness. She confirmed that the complainant came to the house injured on the forehead and on the chin. She also confirmed that the complainant informed her about the rape which occurred. She also went along with the complainant to the police station to report the rape.

[9] E T (the boyfriend of the complainant) was called and confirmed that, he

was informed about the rape by the complainant. He also accompanied the complainant to the police station together with Mildred in the same motor vehicle. The appellant is also known to him even by the name.

[10] Dr Mapeka examined the bleeding complainant, sutured the injured chin and completed the medical report. He also confirmed that the complainant was pregnant when this incident occurred.

[11] Appellant admitted to being at the complainant's house on the night when the complainant was raped. He denied that he broke, entered the house of the complainant and raped her. His version is that, he went to the complainant's place because the boyfriend of the complainant called him to fetch the money at the house. However this version was denied by the boyfriend of the complainant who explained that the appellant left him at the tavern and went away without informing anyone where he was going. The appellant admits that the complainant sustained injuries, but the injuries were inflicted when appellant was fighting with the boyfriend of the complainant.

Issue for determination

[12] The issue for determination before me is whether, the rape committed, was with the infliction of grievous bodily harm.

[13] From the Trial Record, the following is common cause:

The nature, position and extent of the injuries suffered by the complainant (as *indicated on exhibit B Page 222 of the transcribed record).*

- Swollen upper and lower lip because of the blunt trauma.
- A wound on the chin of 0,5 cm wide because of the sharp object and it was sutured. Her T-shirt was blood- stained. Her mouth was full of blood from these injuries.
- She also suffered multiple soft tissue injuries.
- Swelling on the labia minora
- Scarring on the posterior fourchette
- Tearing on the fossa navicularis,

- Swelling on the hymen,
- Fresh tears at 6 o'clock position of the hymen
- Bruising on the hymen.

[14] The complainant was strangled until her body could not sustain her and she lost consciousness.

[15] The appellant submitted that the above injuries inflicted on the complainant did not constitute grievous bodily harm. They were superficial injuries.

[16] Respondent submitted that complainant suffered grievous bodily harm. She testified about her injuries during the trial and the doctor confirmed same. The respondent argued that the question whether grievous bodily harm has been inflicted depends entirely upon the nature, position and extent of the actual wounds or injuries, she referred to the case of S v Maselani and another 2013(2) SACR 172 (SCA),

[17] The court a *quo* found that there was infliction of grievous bodily injuries sustained by the complainant during the rape incident.

Discussion

[18] When determining whether there was infliction of bodily injuries, each case should be assessed on its own merits. It should also be found through evidence that something having serious effects or causing great pain occurred. The action of the appellant when he strangled a pregnant woman until she lost consciousness constituted grievous bodily harm. When she lost consciousness this was a threat also to the babies she was carrying. Even though she could not show any physical injuries caused by being strangled losing consciousness constitute the infliction of grievous bodily harm. The appellant during evidence did not dispute this fact. The argument by the appellant that the complainant did not inform the doctor that she was strangled does take his case any further. In S *v Rabako* 2008 JDR 1068 (O) Musi J said that:

'The absence of medical evidence however is not fatal.'

[19] *In Rex v Ashman* [1858] 1 F & F88, [1858] EngR 88 (C) Willies J said *that: 'For 'harm' to constitute grievous bodily harm it must be such as seriously to interfere with comfort or health'*

[20] It is evidently clear from the report by the Doctor who examined the complainant, that the appellant had inflicted several injuries on the body of the complainant. The appellant argued that those injuries inflicted on the complainant were casual, comparatively insignificant, superficial and do not qualify to be grievous bodily harm.

In S *v Rabako* 2008 JDR 1068 (O) Musi J said

'That it must be remembered that an injury can be serious without there, necessarily, being an open wound.

[21] The Cambridge English Dictionary defines the word 'grievous' as 'serious, severe, grave, bad, critical, dreadful, terrible, awful'.

English Oxford Dictionary meaning of the word 'grievous' is having very serious effects or causing great pain.

[22] The complainant has suffered great pain because of all those injuries which were inflicted on her by the appellant.

In *S v Ferreira* 1961 (3) SA 724 (E) at 725 F - G Cloete AJ albeit in another context opined that:

"One must assess the question of whether the injuries are serious or not, directly with reference to the particular victim who has suffered them and not some arbitrarily defined average human being.

[23] Considering the meaning given to the word 'grievous' in the two dictionaries and courts decisions, I find the argument of the appellant incorrect to say that the injuries suffered by the complainant were superficial insignificant and not grievous. Those injuries caused pain to the complainant and also had a 0.5 wide wound. This is the wound which the doctor found necessary to suture.

[24] Looking at the totality of all the inflicted injuries suffered by the complainant, I find that the injuries constituted grievous bodily harm in these

circumstances.

[25] The magistrate was correct in finding that this was a rape involving infliction of grievous bodily harm. There is no misdirection by the trial court with regard to the injuries suffered by the complainant.

[26] The court *a quo* was correct to find that this rape falls within the ambit of section 51 (1) of schedule 2 of the Criminal Law Amendment Act 105 of 1997.

[27] Now that the minimum sentence is applicable I have to consider whether there are substantial and compelling circumstances in order to deviate from imposing such minimum sentence.

In *State v Matyityi* 2011*(1) SACR 40 (SCA) court held that:*

'The fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer 'business as usual'. A court no longer had a *clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing conscious of the fact that the minimum sentence had been ordained* as *the sentence which ordinarily should be imposed unless substantial and compelling circumstances were found to be present.'*

[28] Section 51(3) (a) of act 105 of 1997 provides that:

' *If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if* a *regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose* a *term of imprisonment for a period not exceeding 30 years.'*

[29] When perusing the transcribed record of the trial court and also listening to the arguments advanced in court during this appeal, the court found that the appellant was

- 33 years old.
- He was unmarried at the time of the incident.

- He had two children.
- He had previous convictions.

[30] Looking at the circumstances of this case It is evidently clear that no one can comprehend fully the range of emotions and suffering the complainant may have experienced because of the brutal sexual violence she has been subjected to on the date of the incident at the hands of the appellant. Depending on her background, her different support system and her different manner of coping with the trauma flowing from this abuse, it will remain a scar on her life difficult to obliterate.

[31] Rape is a serious social problem about which, we are becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. See *De Beer v* S: 121/04) (Delivered on 12 November 2004) (Unreported judgment of the Supreme Court of Appeal) p 18

[32] In this case the appellant conducted himself with a flagrant disregard for the complainant's physical integrity and her pregnant status. He acted in a manner that was unacceptable in any civilised society, particularly one that ought to be committed to the protection of the rights of all persons including women. The public has to be protected from this kind of criminality.

[33] This rape is with the infliction of grievous bodily harm, and it is a serious offence. Even though this offence is serious, yet one notices a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons.

In the case of *Ma/gas* 2001 (1) SACR 469 (SCA) it was held that:

'Judges should not deviate from the prescribed sentences for 'flimsy reasons. It was said that if the sentencing court on consideration of the circumstances of the particular case *is satisfied that they render the prescribed sentence unjust in that it will be disproportionate to the crime, criminal and the needs of the society,* so *that an injustice would have been done by the imposition of that minimum sentence, then the court is entitled to deviate from imposing such sentences.* '

[34] In *S v Ingram* 1995 (1) SACR 1 (A) Smallberger JA said:

'The interest of the society is not best served by too harsh a sentence; but equally so, they are not properly served by one which is too lenient; one must adhere to the objects of the punishment' [see *Samuels* 2011) (1) SACR 9 (SCA)].

[35] Having regard to the appellant's personal circumstances, seriousness of the offence, the impact of the offence to the victim and the interest of the community, I still could not find any substantial and compelling circumstances that warrant me to deviate from the minimum sentence. In *Nyawuza v State* 2014 Joi 32320 KZP it was held that

'The court of appeal does not have an unfettered discretion to interfere with the sentence imposed by the trial court. It is only where it is clear that the discretion of the court was not exercised judicially or reasonably that a *court of appeal will be entitled to interfere. Where there is no clear misdirection, the remaining question is whether there exists such* a *striking disparity between the sentence imposed and the sentences the appeal court would have imposed as to warrant interference. See also Dlumayo and others 1948(2) SA677 A, R v Zonele 1959(3) SA319 A, S v Gqabi 1964(1)* SA *261 T.*

I have found that the Regional Magistrate did not misdirect himself in this regard when he imposed life imprisonment sentence to the appellant. The sentence was appropriate given the circumstances of this case. I will not interfere with the sentence imposed by the trial court.

[36] In the consequence, the following order is made:

1. Appeal on sentence is dismissed
2. The sentence of the trial court is confirmed.

M.M. MUNZHELELE

ACTING JUDGE OF THE HIGH COURT

I agree,

_____

S S MPHAHLELE
JUDGE OF THE HIGH COURT

Counsel for Appellant:	Ms. L.A. van Wyk
Instructed by:	Pretoria Justice Centre, Pretoria
Counsel for Respondent:	Adv. S. Mahomed
Instructed by:	Director of Public Prosecutions